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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

COURTNEY MANBECK, et al.

Petitioners,

v.

KATONAH-LEWISBORO SCHOOL DISTRICT, ROBERT LICHTENFIELD, JAMES MILLIHAN,

Respondents,

On Petition For Writ of Certiorari To The United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of New York has been financing the cost of kindergarten education for a population of 16.4 million people living in the New York City area and Yonkers City. It has, however, denied the 2.6 million residents living outside New York City and Yonkers the same access to kindergarten education. Indeed, the State paid almost 9 billions of dollars in subsidies to the two largest school districts of the state with the highest number of minority students, New York City's and the City of Yonkers', both of which have over 55,000 kindergarten minority students and admit into kindergarten all December-born students. However, the State does not provide any subsidy for but has authorized school districts outside of New York City and Yonkers, such as the Katonah-Lewisboro school district, which is 98 percent white and which has about 250 kindergarten students in any particular year, to deny petitioner and all potential students born in December a public kindergarten education as well as public transportation to a private kindergarten institution pursuant to Sections 3202 and 3635 of New York Education Law. The district court held that petitioner, who was born in December and who was denied a public school education, did not have a property interest in kindergarten education - unlike kindergartners in New York City and the City of Yonkers - and

could not invoke Due Process and Equal Protection claims. In affirming the district court's denial, the Second Circuit's decision directly conflicts with the decisions of other circuits as well as recent decisions of this Court proscribing discrimination in the educational context on the basis of racial classification.

Three questions are presented:

1. Can a State create a property interest by financing kindergarten education for December-born children for the vast majority of children in the state, who live in the school districts having over sixty percent of minority students, in this case the New York City School District and the Yonkers City School District, and that such property interest is recognized as being subject to protection by the Fourteenth Amendment of the United States Constitution?

2. Is a state statute, providing for the exclusion from kindergarten admission by local school district on the basis of the student being born in December, which has been determined to result in condemning the student to suffer a postponement of one year of education, subject to the procedural protections required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

3. Does the application of a facially-neutral

statute in a racially-based manner violate the Due Process and Equal Protection rights of public students affected by the jurisprudence of Parents Involved In Community Schools v. Seattle School Dist. No. 1, 127 S.Ct. 2738 (2007), Goss v. Lopez, 419 U.S. 565 (1975) and Shapiro v. Thompson, 394 U.S. 618 (1969)?

PARTIES TO THE PROCEEDING

In addition to the parties in the caption, Alexandra T. Manbeck, a parent of Courtney Manbeck, is the petitioner, and the following individuals were named as defendants in all the proceedings below: Robert Lichtenfield, in his capacity as School District Superintendent; James Millihan, in his capacity as Transportation Director.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Courtney Manbeck, by and through her mother, Alexandra T. Manbeck, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The initial opinion herein was that of the district court, reported at 437 F.Supp.2d 273 (S.D.N.Y. 2006) and attached at App. 6a-21a. On appeal to the Court of Appeals for the Ninth Circuit, the three-judge panel rendered an unreported opinion available at 2008 WL 376385 and attached at App. 1a-5a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on February 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part: "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." **U.S. Const., amend. XIV, § 1**.

42 U.S.C. § 2000d provides in relevant part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

New York Education Law:

§ 3202. Public schools free to resident pupils...

1. A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition...**Nothing herein**

contained shall, however, require a board of education to admit a child who becomes five years of age after the school year has commenced unless his birthday occurs on or before the first of December.

§ 3635. Transportation

1.a. Sufficient transportation facilities (including the operation and maintenance of motor vehicles) shall be provided by the school district for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children. **Such transportation shall be provided for all children attending grades kindergarten through eight who live more than two miles from the school which they legally attend** and for all children attending grades nine through twelve who live more than three miles from the school which they legally attend and shall be provided for each such child up to a distance of fifteen miles, the distances in each case being measured by the nearest available route from home to school.

STATEMENT OF THE CASE

This case presents an opportunity to clarify for lower courts and school districts across the state and the country how the Due Process and Equal Protection rights of public kindergarten students are affected by the landmark decisions in Parents Involved In Community Schools v. Seattle School Dist. No. 1, 127 S.Ct. 2738 (2007), Goss v. Lopez, 419 U.S. 565 (1975) and Shapiro v. Thompson, 394 U.S. 618 (1969). The case also presents an opportunity to resolve the split among the circuits over whether the Equal Protection Clause allows the states to burden public school admission and to deny public transportation on the basis of race.

A class action was brought by petitioner on behalf of public school system students to review their exclusion from kindergarten admission without hearing under authority of a New York statute permitting exclusion of students for a period of one-year because they happen to be born in December of a particular year and live in districts outside New York City and Yonkers. The complaint sought a declaration that the New York statute was unconstitutional in that it permitted the Katonah-Lewisboro School District to deprive petitioners of their rights to kindergarten education without a hearing of any kind, in violation of the procedural due process component of the Fourteenth Amendment. It also sought to

enjoin the public school officials from denying them public transportation concomittant with public education. The district court held that there is no property interest in a kindergarten education for children living outside of New York City and Yonkers and held that petitioner had no Due Process or Equal Protection claims for the deprivation of kindergarten admission. The Court of Appeals affirmed.

FACTUAL AND LEGAL BACKGROUND

Although this is a class action challenging an institutional practice embodied in a law and a regulation, it is thought useful to outline briefly the facts surrounding the application of this law and how it discriminates against all children living outside of New York City and Yonkers.

A- STATE OF NEW YORK'S RACE-BASED APPLICATION OF THE STATUTE

The State of New York subsidizes the public education of all kindergarten students in New York City and Yonkers, which have a total of 16.4 million residents out of a state population of 19 million. In effect, the remaining 2.6 million residents do not receive any state aid for schooling their children. The New York City school district and the Yonkers school districts are the two largest school districts of the state

and have a kindergarten class of about 55,000 students. http://schools.nyc.gov/AboutUs/DOEData/Stats/default.htm; http://yonkerspublicschool.org/budget/. In the year 2007-2008, the state provided $208 million in subsidies to the Yonkers school system and $8 billion to the New York City school system. *See* http://www.nyccnet.edu/offices/d%5Fchanc%5Foper/budget/exp01/y2004_2005/function.asp; http://schools.nyc.gov/offices/d_chanc_oper/budget/dbor/fsr/September/pdf/09Cover/pdf. New York City and Yonkers school systems have a non-white kindergarten student body of over 60 percent and admit all students born in December in their December class. *Id.* At the same time that the state is subsidizing education for the New York City and the City of Yonkers kindergarten class, the state discriminates against children in other school districts by allowing those districts to exclude December-born children from their kindergarten class. The State provides no money whatsoever for the Katonah-Lewisboro school district, unlike the City of New York's and Yonkers' systems.

Indeed, the State is subsidizing kindergarten education for a population of 16.2 million state residents of New York City and the 200,000 residents of Yonkers, while denying the remaining 2.5 million residents who live out of New York City and Yonkers the right to kindergarten education if they happen to be born

in December of a particular admission year. *See* http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US36&-ds_name=DEC_2000_SF1_U&-_lang=en&-redoLog=false&-mt_name=DEC_2000_SF1_U_GCTP6_ST7&-format=ST-7&-CONTEXT=gct (The State of New York has a total population of 18.9 million people according to the 2000 Census).

B- NEW YORK EDUCATION LAW § 3202

In contrast to the New York City School System and the City of Yonkers School District, the Katonah-Lewisboro School District (hereinafter "School District"), whose population numbered 12,000 and which has only 250 kindergarten students compared to the 55,000 kindergarten students of New York City and Yonkers, whose population numbers 16.4 million, denied petitioner Courtney Manbeck (and all other similarly situated children) entrance to the public school kindergarten for the 2005-2006 academic year because, having been born on December 11, 2000, she did not become five years of age on or before December 1, 2005 as required by the admission policy of the School District pursuant to New York Education Law § 3202. However, aside from the New York City School System and the City of Yonkers School District, non-public, private schools admit children born in December 2000. Once Courtney

Manbeck became enrolled in a non-public school kindergarten, the School District denied her public transportation, claiming that she was not "legally attending" school. Courtney filed a lawsuit in Federal District Court contending that the School District's policy of denying all children born in December of a particular year both public education and transportation violates their rights to Due Process and Equal Protection under the Fourteenth Amendment to the United States Constitution since the State pays for kindergarten education for all December-born students in the largest public school systems in the State, the New York City public school system and the Yonkers public school system with their 55,000 kindergarten students. The official website of the New York City public school system sets forth the following information regarding kindergarten admission:

Who is eligible to register for public school?

Registration is for children who are:

1) New to the New York City public school system

2) Returning to the New York City public school system

Students between the age of 5 and 21 residing in New York City - who have not graduated from high school - are eligible to attend one of the City's schools free of cost. Although Kindergarten isn't mandatory in NYC Schools, **a child must**

be age 5 by December 31 of the year he/she will enroll in kindergarten. *See* www.nycenet.edu/Offices/StudentEnroll/general/general.htm, (emphasis added).

Given that the State has been directly financing kindergarten admission for New York City and the City of Yonkers, which have over sixty percent minority students and a kindergarten class of 55,000 pupils, the State has created a property interest in kindergarten education for all December-born kindergarten age children. Any child who does not attend the New York City or the City of Yonkers school system is subject to exclusion from kindergarten admission if he or she happens to be born in December .

C- THE PUBLIC KINDERGARTEN MARKET PLACE

Like the New York City public school system and the Yonkers School District, the economic marketplace has set December 31 as the cutoff date for admission into kindergarten. The impact of the State-censored policy is borne by a subclass of children who live outside New York City and Yonkers and whose parents cannot afford private tuition and transportation, since the private marketplace, like the New York City public school systems and the districts of

Yonkers, admits children who turn five by December 31 of the year they are enrolled in their kindergarten.

Although petitioner Courtney Manbeck was denied a public kindergarten education, she was admitted in the kindergarten class of the private Melrose School. Melrose, which like other New York private schools within 15 miles of plaintiff's home, uses a December 31 cutoff date. Once Courtney had finished private kindergarten in June 2006, she became eligible to attend public first-grade school. In effect, by fully subsidizing kindergarten education for all 55,000 students in the City of New York and Yonkers, the State cannot claim that there is no legitimate property interest in a kindergarten education for the students living outside of New York City and Yonkers. This is especially true in view of the fact that the economic marketplace has challenged the policy set by the State by offering a competitive solution to a subclass of kindergarten students whose parents are able to afford both education and transportation, such as petitioner Courtney Manbeck. Those children who are denied a public kindergarten education can always get admitted into a private kindergarten class and transfer into first grade in the public school system. Although the State Commissioner of Education did try in 1958 to adopt administrative regulations that would have prohibited private schools from admitting

kindergartners born after the cutoff date of the local school district, affected private schools managed to secure a state court ruling with forbids the New York Department of Education and its local districts from denying first grade admission (in the public schools) to kindergartners who attended private school kindergarten but were not old enough to attend public school kindergarten. *See* Jokinen v. Allen, 182 N.Y.S.2d 166, 15 Misc.2d 124 (Special Term 1958)(the local districts must admit into first grade a child of five years and eight months if he has attended a nonpublic kindergarten, even though the school is unregistered).

Since the private sector has received the blessing of the state judiciary which held that public schools must admit into first grade any kindergartners from an unregistered or registered school, subsequent regulations issued by the Commissioner concerning the voluntary registration of private schools have no effect on the unregistered private sector's kindergarten business. N.Y. Comp. Codes R. & Regs. Tit. 8, §§ 125.1 *et seq.*, which are the Commissioner's regulations regarding voluntary registration of nonpublic nursery schools and kindergartens, states in relevant part as follows:

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK TITLE 8. EDUCATION DEPARTMENT CHAPTER II.

REGULATIONS OF THE COMMISSIONER
SUBCHAPTER F. PRIVATE SCHOOLS

PART 125. VOLUNTARY REGISTRATION OF NONPUBLIC NURSERY SCHOOLS AND KINDERGARTENS

Section 125.9 Admission to kindergarten.

A kindergarten shall not admit a child who is younger than the age of entrance into the public schools established by the school district in which that child resides.

Although the State Commissioner of Education issued regulations concerning voluntary registration of private schools, these regulations are in practice irrelevant since the case Jokinen v. Allen permits the private sector to offer a market alternative to the local district's cutoff date. The end result is that although the School District's policy discriminates against all children outside of New York City and Yonkers who turn five during the month of December of the year they are enrolled in kindergarten, the impact of such policy is borne primarily by the subclass of children whose parents cannot afford private tuition and transportation. *See* Merrill, The Landscape of Constitutional Property, 86 Va. L.Rev. 885, 964, n. 289 (2000) (remarking,

with regard to the property interest recognized in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), that "any parent who has contemplated sending their children to private schools knows that public schooling has a monetary value"). .

REASONS FOR GRANTING THE PETITION

Although the Court of Appeals purported to apply Goss v. Lopez to hold that New York law on its face does not provide that kindergarten education for December-born children is a protected interest, the Court of Appeals failed to consider the unequal application of the statute which results in discrimination of petitioners on the basis of their race. In the 2005-06 school year, the School District denied over 25 December-born kindergarten admission because they lived in the predominantly white district outside of New York City and Yonkers, whereas some 4,000 December-born students were admitted into kindergarten in New York City and Yonkers.

The uneven application of the New York statute results in race-based admissions which impose significant burdens on affected families living outside of Yonkers and New York City: (1) denial of admission to kindergarten; (2) imposition of burden on parents to provide for pre-school

education for a year prior to kindergarten admission and for transportation even if they enrolled their children in private education and (3) denial of kindergarten education would stunt petitioners' intellectual and emotional development and effectively amounts to a demotion from kindergarten to preschool grade. As the Second Circuit stated in Gant v. Wallingford Board of Education, 69 F.3d 669, 678 (2d Cir. 1995), "[d]emotion, even at this rudimentary stage of education, may permanently delay the student's ultimate academic goals."

The burden is even more onerous since the New York City and Yonkers offer public pre-kindergarten education to children free of charge whereas children living outside of those two areas are not afforded public pre-kindergarten education. Not only would financial limitations would prohibit the great majority of petitioners from seeking a private kindergarten education, petitioners would also be deprived of a public pre-kindergarten education.

I- THE COURT OF APPEALS WRONGFULLY HELD THAT KINDERGARTEN EDUCATION IS NOT A PROTECTED INTEREST WITHIN THE MEANING OF THE DUE PROCESS CLAUSE

The Court of Appeals held that because there is no constitutional right to a kindergarten

education at public expense, the Due Process Clause does not protect against exclusion from the public school system for December-born students in districts other than the New York City and Yonkers school districts, even though such education is made available to all New York City and Yonkers' 16.4 million residents. Having chosen to extend the right to kindergarten education to people of petitioner's class generally, *i.e.*, 16.4 million residents out of 19 million residents, New York may not claim in good faith that the remaining 2.6 million residents could be denied such right absent fundamentally fair procedures to determine whether such denial is justified.

In ***Board of Regents of State College v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972)**, this Court ruled that one must have a "liberty" interest or a "property" interest in order to invoke Due Process protection. Both reason and this Court's precedents support a holding that kindergarten admission in New York for December-born children satisfies the criterion for each of these interests.

In ***Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694 (1954)**, this Court again held that education was a liberty subject to Due Process protection. Moreover, this Court affirmed this important principle in *Roth*, when it quoted approvingly the above-stated definition of liberty from Meyer v. Nebraska, 262 U.S. 399, 43 S.Ct.

625 (1923). In Goss v. Lopez, 419 U.S. 565 (1975) this Court reiterated that education is a fundamental interest within the meaning of the Due Process Clause. Thus this Court has been consistent in following its acknowledgment in Goss that the "liberty" of the Due Process Clause, at the very least, includes the right to education.

Given that the State has extended such "liberty" or "property" interest to 16.4 million citizens, the State has created a property interest in education and cannot claim that such interest can be denied at the whim of individual school districts.

II- IN CONFERRING THE RIGHT TO KINDERGARTEN EDUCATION TO 16.4 MILLION RESIDENTS OUT OF THE 19 MILLION STATE RESIDENTS, THE STATE HAS CREATED A PROPERTY AND A LIBERTY INTEREST IN EDUCATION

The State of New York has a total of 19 million residents, based on the 2000 Census. About 16.4 million residents live in New York City and in Yonkers. The State provides 9.2 billion dollars in subsidies to the New York City and Yonkers systems and direct local authorities to provide a free education to all residents between five and 21 years of age. N.Y. Ed. § 3202. Although it is true that of the Code permits school districts to deny

students kindergarten admission because they turn five during the month of December of the admission year, the state has preferentially subsidized admission for the vast majority of such students in New York City and Yonkers while at the same time allowing school districts outside of New York City and Yonkers to deny petitioners the right to kindergarten admission. Given that the State has been subsidizing kindergarten admission to 16.4 million New York City and Yonkers residents out of the 19 million state-wide residents, the State has created a right to kindergarten admission which must be considered to be a "property," as well as a "liberty," interest, subject to Due Process Protection pursuant to Goss v. Lopez. Having chosen to extend the right to kindergarten education to people of appellants' class generally, New York has conferred a property interest and may not withdraw that right on the whim of individual school districts absent fundamentally fair procedures to determine whether the denial is justified.

III- ON THE BASIS OF STATE LAW, PETITIONERS HAVE LEGITIMATE CLAIMS TO KINDERGARTEN EDUCATION. THERE IS SEVERE HARM IN BEING DEMOTED TO PRE-KINDERGARTEN TRIGGERING DUE PROCESS PROTECTIONS

This Court has defined liberty and property

interests by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus the welfare recipients in Shapiro v. Thompson, 394 U.S. 618 (1969), had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them and could not be denied benefits for the first year of arrival in the state.

Similarly, there is a certainty that substantial harm will result whenever a child is excluded for one year from this important interest of receiving a kindergarten education. The obvious loss through deprivation of education coupled with the substantial probability of collateral consequences meets that quantum of harm required to invoke the Due Process clause enunciated in Goss v. Lopez and Shapiro v. Thompson.

The New York Education statute operates in the School District to deny non-minority children kindergarten admission solely because they live outside New York City and Yonkers. Because Equal Protection rights are individual, personal rights, *e.g.*, in Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("the Fourteenth Amendment 'protect[s] *persons*, not *groups*' ") (emphasis in original, quoting and Adarand Constructors Inc., v. Pena,

515 U.S. 200, 227 (1995), each student affected by the New York statute suffers injury, an infringement of her personal right to be free from race-based decision-making by government and the denial of an otherwise generally available benefit - admission to kindergarten - solely because of her race.

IV. THE COURT OF APPEALS INCORRECTLY HELD THAT COURTS SHOULD DEFER TO THE LEGISLATURE AND LOCAL SCHOOL DISTRICTS

The court inappropriately deferred to the local School District without considering the state's preferential treatment of the New York City School District and Yonkers School District and presumed that the age cut-off of December 1 was justified "to establish classifications that roughly approximate the nature of the problem perceived." The District asserts, and the court of appeals accepts that the classification is related to "the nature of the problem perceived", i.e., the young age of petitioners make them too immature and unqualified for kindergarten admission, without considering that the State did not deem such problem to exist in the tens of thousands of students in New York City and in Yonkers. The State's subsidy of kindergarten admission in those places establishes (1) a state-sponsored property

and liberty interest in kindergarten education, and (2) a *de facto* racial classification based on the selective and preferential application of the New York statute in New York City and in Yonkers. Both the New York City and Yonkers student body is composed of over sixty percent of minority students. Such *de facto* racial classification is proscribed by this Court in the recent case of Parents Involved In Community Schools v. Seattle School Dist. No. 1, 127 S.Ct. 2738 (2007).

In accepting the School District's claim that petitioner Courtney was denied kindergarten admission due to the "nature of the problem perceived" and in refusing to consider the State's preferential treatment of the two largest school districts of the State, the court of appeals allowed the State's application of the statute to result in *de facto* racial classification. Accepting the School District's claim, the court of appeals allowed the school districts complete discretion by which children are granted or denied kindergarten admission according to whether or not they lived in New York City or Yonkers. Aside from the fact that outside of New York City and Yonkers kindergarten admission is subject to the whims of individual school districts, the State's subsidies creates a *de facto* classification based solely on race.

V. THIS COURT HAS PROSCRIBED SELECTIVE AND PREFERENTIAL TREATMENT OF STUDENTS ON THE BASIS OF RACE

While the due process clause of the Fourteenth Amendment has been interpreted to apply to a 10-days suspension from public school, Goss v. Lopez, this Court has never addressed the issue whether the equal protection clause is likewise applicable. Both the language and import of the two clauses fundamentally differ. See, Mathews v. Diaz, 426 U.S. 67, 68 (1976). Whereas the due process clause provides procedural protection for whatever rights a person might otherwise possess, the equal protection clause guarantees equal rights to "government benefit[s]."

There is no dispute that the effect of the waiting-period requirement in petitioner's case is to create two classes of resident families indistinguishable from each other except that one is composed of residents who resided in New York City or Yonkers, and the second of residents who resided outside of those jurisdictions. On the basis of this sole difference the first class is granted unconditional admission to kindergarten and the second class is denied admission for another year. The statutory denial of admission to December-born students creates a classification which constitutes an invidious discrimination denying them equal protection of the laws and conflicts

with this Court's holding in Shapiro v. Thompson. The government's interest - denial of kindergarten education to December born students to save local districts money - is promoted by classification which either may not constitutionally be promoted by government or are not compelling governmental interests. The School District justified the one-year waiting-period requirement as a protective device to preserve the fiscal integrity of state public school districts without mentioning that massive state funds have been granted to New York City and Yonkers' school districts, both of which admit all December-born students in kindergarten, thereby making kindergarten admission a state-sponsored property and liberty interest.

The ramifications of the Second Circuit's decision about whether states may, consistent with the Equal Protection Clause, engage in preferential and selective treatment resulting in racial discrimination, are significant. Left undisturbed, the states may confer huge financial subsidies to ensure school admission to a selected majority of its citizens - 16.4 million people - and yet allow a substantially white minority - 2.4 million - to be denied the same privilege, creating a *de facto* discrimination on the basis of race. Accordingly, this case is an excellent vehicle for this Court to clarify the application of Goss, Shapiro, and Parents Involved In Community Schools v. Seattle School Dist. No. 1 to elementary public schools and to confirm that these cases are

not a license to ignore the long line of Due Process and Equal Protection cases decided by this Court that expressly and repeatedly condemn selective treatment and racial classification as unconstitutional.

VI- THERE IS A SPLIT AMONG THE CIRCUITS OVER WHETHER DEPRIVATION OF PUBLIC TRANSPORTATION VIOLATES THE EQUAL PROTECTION CLAUSE

Clearly, it is well-established that access to education and transportation to and from school is a constitutional right pursuant to the Supreme Court's precedent, as follows:

> We must point out that busing as a constitutional right is not an issue in this case...Segregated schools violate the pupils' right to equal protection of the law. When that right is violated, students may ask the federal district court for relief that will restore students' constitutional rights in a manner appropriate to the school system...

Swann v. Charlotte-Meckleburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 1276 (1971). Similarly, the circuit courts other than the Second Circuit have also recognized that busing is a right integral with equal access to an education. In Brown v. Board of Education of City of Bessemer, 464 F.2d 382 (5th Cir. 1972), the court held that busing was required because it was necessary to

implement a court-ordered desegregation plan. In Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir. 1986), the court held that the school was required to provide transportation for handicapped children to ensure their access to an education. In United States v. School District 151 of Cook County, 404 F.2d 1125 (7th Cir. 1968), the court held that district courts may consider problems related to school transportation to achieve a system of determining admission to schools to all students regardless of their race. In United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), the court acknowledged that lack of access to school bus transportation would deprive the students of an education and directed the school district to make arrangements to provide transportation, as follows:

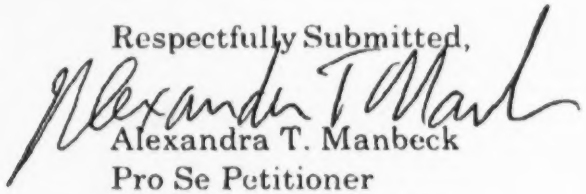
> Where transportation is generally provided, buses must be routed to the maximum extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing either the formerly white or formerly Negro school nearest his residence must be transported to the school to where he is assigned under these provisions, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.

In all cases involving equal access to an education, the courts of other circuits have unanimously mandated that school bus transportation be provided so that the student may receive an education. Washington et al. v. Seattle School District No. 1, et al., 102 S.Ct. 3187, 458 U.S. 457 (1982); Watson et al. v. City of Memphis, 83 S.Ct. 1314, 373 U.S. 526 (1963). It follows that since the school district has been providing transportation to all kindergarten students in this district, its refusal to provide transportation to petitioner deprives her of the fundamental Fourteenth Amendment property interest without due process. Brown v. Board of Education, 347 U.S. 483, 493, 74 S.Ct. 686, 691 (1953).

CONCLUSION

The split among the circuits that have ruled on whether busing is a protected interest requires resolution, aside from the Second Circuit's drastic departure from this Court's recent ruling in Parent Involved In Community Schools v. Seattle School Dist. No. 1 For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully Submitted,



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